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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 990

W. S. DICKEY CLAY MANUFACTURING COMPANY,
Petitioner,

vs.

WILLIAM H. CORDER, D/B/A W. H. C. TRUCKING COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Supreme Court of the United States:

Respondent, William H. Corder, doing business as W. H. C. Trucking Company, respectfully files this brief in opposition to the petition for a writ of certiorari filed herein by petitioner, W. S. Dickey Clay Manufacturing Company.

JURISDICTIONAL GROUNDS

Respondent denies the assertions in the first paragraph under the above heading in the petition for certiorari, page 2, except the statement that federal statutes are not involved.

The Court of Appeals decided the state questions involved in this case in complete conformity with the Texas statutes and the construction of those statutes by the Texas courts and by the Supreme Court of the United States. The decision recognizes and carefully conforms to long established state policy requiring that contract motor carriers charge at least the minimum rates prescribed by the Texas Railroad Commission. This policy, observed by the decision of the Court of Appeals, is essential to the integrity of the Texas transportation regulatory system, as this Court has recognized in *Steele* v. *General Mills*, 329 U.S. 433.

QUESTIONS PRESENTED FOR REVIEW

Respondent denies that petitioner has correctly stated the questions presented for review. As is apparent from the opinions of both of the lower courts, the questions decided in this case are quite different from the statement in the petition for writ of certiorari, pages 2-3.

1. This case does not present any question relating to the right, if any, of a carrier and a shipper to agree upon rates to be charged in the *absence* of orders of the Railroad Commission prescribing applicable rates. On the contrary, the record shows that the Railroad Commission at all relevant times *had* prescribed minimum rates

for the services rendered by Corder in transporting clay pipe for Dickey, and both of the lower courts so found. The decision was that the shipper and the carrier could not by contract fix rates lower than the minimum rates which the Railroad Commission had prescribed.

2. The case does not involve the broad question of failure of consideration as affecting the enforceability of written contracts. Both lower courts held that the express agreement in the contracts between Corder and Dickey to comply with all lawful orders of the Railroad Commission was controlling and could be enforced by Corder, notwithstanding inconsistent provisions that rates would be charged which were lower than the minimum rates fixed by the orders of the Railroad Commission.

3. The case does not involve the question whether the Texas two year statute of limitations is applicable to a suit for "additional freight charges not founded on a contract in writing." Both of the lower courts held that the suit in this case *is* founded on contracts in writing. The transportation services were rendered by Corder for Dickey under written contracts. The District Court held that the suit came under the four year statute because it was founded upon the express provision of the written contracts that the carrier would comply with all lawful orders of the Railroad Commission, and also on the obligation implied as a matter of law from the written contracts for transportation services that lawful rates would be charged for such services. The Court of Appeals approved the first holding that the suit was founded on the express provision of the written contracts and found it unnecessary to pass on the question whether actions on obligations implied as a matter of law from written contracts would come under the limitation statute applicable to actions founded on contracts in writing.

4. The case does not involve any rates or regulations which were merely published by carriers without being prescribed by the Railroad Commission of Texas. On the contrary, the record shows and the courts below found that the Railroad Commission of Texas had consistently performed its statutory duty of prescribing minimum rates for contract motor carriers, including rates for the services performed by Corder for Dickey.

STATEMENT OF THE CASE

Petitioner's statement of the case is in important respects inaccurate and omits significant facts. Respondent therefore submits the following brief statement:

Contracts and Permits under Which Corder Operated

Corder transported clay pipe for Dickey by truck in volume quantities from March 3, 1952, to November 2, 1956, originally as the assignee of Cage Trucking Company, under a contract which Cage had made with Dickey on July 12, 1949. (Plaintiff's Exhibit 1, R., 49) Dickey's contract with Cage provided that Cage would charge rail carload rates for such services. The contract also provided, however, that Cage would comply with all lawful rules, regulations, and orders required of a contract motor carrier by the Railroad Commission of Texas. (R. 52) In order to transport pipe under the contract with Dickey, Cage applied for and obtained from the Railroad Commission a permit to operate as a contract motor carrier. The order granting the Cage permit and the permit itself both contained the express provision that "the minimum rate to be charged by applicant shall not be less than that charged by common carrier motor carriers under the rates fixed by the Railroad Commission." (Plaintiff's Exhibits 2 and 3, R., 54, 58)

In order to operate as assignee of Cage, Corder applied to the Railroad Commission for approval of the sale and transfer of the permit from Cage to him. By order entered on March 4, 1952, the Railroad Commission approved the sale and issued a permit to Corder. (Plaintiff's Exhibit 9, R., 66) The Corder permit contained the identical language contained in the Cage permit, by which the Commission found that the service rendered by applicant was "more substantially similar to that of a common carrier motor carrier" and ordered that "the minimum rate to be charged by the applicant shall not be less than that charged by common carrier motor carriers under the rates fixed by the Railroad Commission." (Plaintiff's Exhibit 10b, R., 13-14, 93).

On or about June 1, 1954, Corder made a new contract with Dickey, which continued to provide for charges based on rail carload rates, but also contained the provision that Corder would comply with all the lawful rules, regulations, and orders required of a contract carrier by the Railroad Commission. (Plaintiff's Exhibit 15, R., 17-18, 115)

The Railroad Commission's Construction of Its Orders by Its Chief Rate Inspector

On November 1, 1956, the Chief Rate Inspector of the Railroad Commission of Texas inspected Corder's records and informed Corder that he was not charging the correct rates. On the next day, the Chief Rate Inspector also wrote to the General Manager of Dickey's San Antonio plant, advising him that the position of the Railroad Commission was that the rates which should have been charged by Corder for service rendered in transporting Dickey's pipe were the rates prescribed in Tariff 25 E, which was the tariff fixing the rates for common

carrier motor carriers for similar services. (Plaintiff's Exhibit 19, R., 69)

On November 14, 1956, the Chief Rate Inspector of the Railroad Commission filed three criminal complaints against Corder and also three complaints against Dickey's manager in the Justice Court in Travis County, Texas, for failing to comply with the rules and regulations of the Railroad Commission, in that Corder had not charged and Dickey had not paid the rates fixed by the Railroad Commission under Tariff 25 E. Both Corder and Dickey's manager were found guilty as charged and paid fines under these complaints, the manager's fine being paid with a Dickey check. (R., 129)

Thereafter, Corder submitted to Dickey a claim for the difference between the rates charged and collected and the rates which should have been charged under the Tariff 25 Series, according to the interpretation of the Railroad Commission's orders by its Chief Rate Inspector. (R., 130) Dickey refused to pay these undercharges, and this suit resulted.

The Parties' Contentions

Corder's position in this litigation is (1) that the specific orders and permits under which he was transporting clay pipe for Dickey required that he should charge for his services not less than the rates fixed by the Railroad Commission for similar services by common carrier motor carriers, (2) that the Railroad Commission during the time Corder was rendering such transportation services for Dickey had fixed rates to be charged by common carrier motor carriers for similar services, and (3) that the applicable tariffs and classifications prescribed by the Railroad Commission for common carrier motor carriers and as

a minimum for contract carriers, were the Tariff 25 Series and the National Motor Freight Classifications in effect at the relevant times.

On the other hand, Dickey contends that the provisions in the orders and permits under which Corder was operating were "meaningless" (Petition, 12) because Dickey claims that the Railroad Commission had not prescribed any rates for similar services to be performed by common carrier motor carriers, and therefore that the parties were free to contract for any rates that they pleased. As an alternative contention, Dickey has at times asserted that if any rates were prescribed, they were not the rates fixed for common carrier motor carriers, but the lower rates fixed for specialized motor carriers. (Petition, 12) However, it is admitted (Petition, 9), as is evident from the orders themselves (Petition, 53), that in fixing rates for specialized motor carriers the Railroad Commission made no provision that such rates should be applied as a minimum by contract motor carriers. The Commission, on the other hand, did so provide in orders relating to common carrier motor carriers. (Petition, 51-52)

The Statutes and the Railroad Commission Orders

In order to resolve these issues between the parties, it was necessary for the District Court and the Court of Appeals to examine the relevant Texas statutes and to consider the numerous orders of the Railroad Commission promulgated under those statutes, which prescribed the rates which shall be charged by the three classes of motor carriers, namely, (1) common carrier motor carriers, (2) specialized motor carriers, and (3) contract motor carriers.

The District Court in its opinion carefully reviewed the statutory history (R., 407-409) and also reviewed the

Railroad Commission's orders (R., 409-415) under which the Railroad Commission has prescribed rates for common carrier motor carriers and contract motor carriers, including the transportation of freight in truckload or volume quantities. The orders of the Commission show that since 1931, when contract motor carriers were designated as a separate class by statute, the Railroad Commission has repeatedly provided by its orders that the rates prescribed in the tariffs for common carrier motor carriers shall be the minimum rates to be charged by contract motor carriers for similar services.

The conclusion of the District Court, approved and quoted by the Court of Appeals (R., 465-475), was that the Railroad Commission had performed its statutory duty in prescribing minimum rates to be charged by Corder as a contract motor carrier and that such minimum rates were the rates fixed by the Tariff 25 Series and the National Motor Freight Classifications in effect at the time the various shipments of Dickey's pipe were transported by Corder. Both courts concluded that to hold otherwise would be to ignore the findings of the Railroad Commission to the effect that the services rendered by Corder were substantially similar to those of common carrier motor carriers and that the minimum rate to be charged by Corder would be not less than the rate fixed for common carrier motor carriers by the Railroad Commission. (R., 414, 473)

The opinions below show on their face that the issues of fact were thoroughly and carefully considered. The petition for certiorari simply contains unsupported assertions contrary to the findings and conclusions of the lower courts. Believing that nearly all of the arguments in the petition for certiorari are demonstrated to be unsound by the opinion of the Court of Appeals, we will not repeat

what is said in that opinion and we will refer to only two of Dickey's assertions that might be confusing if they were not answered here.

On page 7 of the petition for certiorari Dickey says that on June 6, 1941, the Texas Attorney General ruled that "common carriers" referred to in Article 911b, Section 6-aa, Vernon's Texas Civil Statutes,* included rail carriers as well as common carrier motor carriers. While petitioner says nothing more about this subject, the Court might infer that the 1941 ruling of the Texas Attorney General is recognized law in Texas. The record shows, however, that while for a brief time in 1943 the Railroad Commission attempted to require rail carload rates to be charged by contract motor carriers for truckload shipments, such orders were enjoined by the State District Court in Travis County, Texas, on August 25, 1943 (Plaintiff's Exhibits 52, 53, R., 380-384), and the Commission, in view of the Court's judgment, on October 8, 1943, withdrew those orders. (Motor Freight Circular 2728, Defendant's Exhibit 13, R., 254, and see statements and concessions of counsel for Dickey, R., 255-257.) In 1949, when the Cage contract was made with Dickey, and at all times when Corder was hauling for Dickey, there was no lawful authority at all for a contract motor carrier to base his charges on rail carload rates.

While Dickey argues that the orders of the Railroad Commission prescribing minimum rates to be charged by

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*This statute reads as follows:

"Sec. 6-aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

Corder were "meaningless" (Petition, 12), and at various places in the petition that the rates to be charged could not be ascertained from the tariffs and classifications relied upon by the lower courts, there is really no difficulty in applying these rates and classifications. The use of the tariffs and classifications in determining the correct charges was explained by Mr. Burch, the expert witness for Corder. (R., 196-201, 207) Even Mr. Eskelin, the Traffic Manager for Dickey, had no difficulty in computing charges under the Tariff 25 Series for services which Corder had performed for Dickey, when he was requested to do so by Dickey's counsel. (R., 336, 337)

There Is No Reason to Grant Certiorari, Because the Decision of the Lower Courts Follows the Texas Statutes, the Texas Decisions, and the Decision in the Steele Case by This Court

Dickey does not deny that under the Texas statutes the duty rested upon the Railroad Commission to prescribe minimum rates to be collected by contract motor carriers at not less than the rates fixed for common carriers for substantially the same service. The lower courts have held that the Railroad Commission performed that duty. Under the decisions of the Texas courts, there is a public obligation upon the carrier to collect the rates fixed by the Railroad Commission, regardless of any private contract. *Texas & New Orleans Railroad Company* v. *Yates*, 139 Tex. 89, 161 S.W.2d 1050. This rule has been recognized and applied in *Steele* v. *General Mills*, 329 U.S. 433.

Dickey attempts to distinguish the *Steele* case because in the present case there was a finding that both parties acted in good faith in providing that the rates to be charged should be based upon rail carload rates. However, it is submitted that the same rule of public policy applies in

this case even more strongly than in the *Steele* case. In that case the carrier was charging rates lower than the lawful rates with full knowledge that he was not complying with the regulations of the Railroad Commission. In fact, in the *Steele* case, there was evidence that the shipper had been led into the execution of the illegal contract for lower rates by the carrier. (See 327 U.S., at 436) Nevertheless, the Supreme Court held that the carrier was entitled to collect the difference between the rates fixed by the Railroad Commission and the rates provided in the contract. Corder has an even stronger case for enforcing the legal rates as determined by the orders of the Railroad Commission, because it cannot be argued that Corder had any knowledge that he was charging less than the legal rates or that he had led Dickey into making an illegal agreement.

It might be argued that the Railroad Commission could more appropriately have fixed other rates (such as those prescribed for specialized motor carriers) as the minimum rates to be charged by Corder for his services rendered for Dickey. The fact remains, however, that it did not do so, and the Commission's findings and orders under settled Texas law are not subject to collateral attack. *West Texas Compress and Warehouse Company* v. *Panhandle and S. F. Ry. Co.*, (Tex. Com. App.) 15 S.W.2d 558; *Texas Steel Company* v. *Fort Worth & D. C. Ry. Co.*, 120 Tex. 597, 40 S.W.2d 78; *Railroad Commission* v. *Robcrdeau*, 150 Tex. 307, 242 S.W.2d 881.

Having found and concluded that the District Court was correct in holding that the Railroad Commission has prescribed minimum rates to be charged by Corder, the Court of Appeals certainly did not pass upon any question relating to the rights of the parties if the Commission had not prescribed any rates for the service rendered by

Corder. Nor did the Court of Appeals hold that carriers can by publication amend and revise the rates previously prescribed by the Railroad Commission. On the contrary, the Court found and held that the Tariff 25 Series and the National Motor Freight Classifications were adopted by the Railroad Commission. Revisions of the Tariff 25 Series (designated as Tariff 25, A, B, etc.) were simply published for the purpose of incorporating changes made by Railroad Commission orders. Each of the relevant National Motor Freight Classifications was specifically adopted.

The holding of both of the lower courts, we re-emphasize, is in complete conformity with established policy in Texas. On the other hand, a holding in line with the contentions made by Dickey would create a chaotic condition in the Texas regulatory system relating to motor carriers. If the Court should accept Dickey's contentions, then the inevitable result would be that in large areas of motor transportation the Commission has wholly failed to discharge its statutory duty of prescribing rates, and the carriers by agreement with the shippers could charge any rates which they pleased. This situation of course would be exactly the opposite of what the Supreme Court of the United States has held to be the regulatory system envisaged by the Texas motor transportation statutes, in *Steele v. General Mills*, 329 U.S. 433.

The recognized Texas policy would also obviously be defeated if it were held that a transportation contract is void and unenforceable in toto if there is a provision in the contract for rates less than the legal rates. The effect of such a holding, as advocated by Dickey (Petition, 17), would mean that the carrier could not collect any charges for his services at all, if the shipper chose not to pay. Nothing could more completely nullify the Texas policy

that the legal charges must be paid by the shipper and collected by the carrier in full. The holding in cases such as *City of Memphis* v. *Browder*, (Tex. Civ. App.) 4 S.W.2d 614, cited by Dickey (Petition, 17), which was reversed in *City of Memphis* v. *Browder*, (Tex. Com. App.) 12 S.W.2d 160, is simply not applicable where the paramount consideration is the enforcement of the state's policy requiring the uniform and full payment of rates prescribed by the public authority.

The holding of the lower courts that the action is founded on contracts in writing (and therefore that the four year statute of limitations applies) is likewise in accord with the holding on this point in *Steele* v. *General Mills*, 329 U.S. 433. The petitioner cites no Texas cases to the contrary. Actually the holding on the issue of limitations by both of the lower courts is fully sustained by Texas decisions. *Elder Dempster & Company* v. *St. Louis, Southwestern Railway Company*, 105 Tex. 628, 154 S.W. 975; *International Printing Pressmen & Assistants Union* v. *Smith*, 145 Tex. 399, 198 S.W.2d 729; *Texas Pacific Coal & Oil Company* v. *Stuard*, (Tex. Civ. App.) 7 S.W.2d 878 (writ refused); *Kerby* v. *Collin County*, (Tex. Civ. App.) 212 S.W.2d 494.

CONCLUSION

It is respectfully submitted that the Court of Appeals, in affirming the District Court, has carefully and correctly applied the Texas statutes, as construed by Texas decisions and by the decision of the Supreme Court of the United States in *Steele* v. *General Mills*, 329 U.S. 433. There is clearly no ground for the Court to grant a writ of certiorari in this case to correct any holding on the law. As to the findings of fact by the District Court, also affirmed by

the Court of Appeals, there is ample support in the voluminous record.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James P. Hart, an attorney for respondent, William H. Corder, certify that I have mailed copies of the foregoing brief by first class United States Mail to Mr. Carl L. Phinney, 617 First National Bank Building, Dallas 1, Texas, and to Messrs. Sam Dawkins, Jr., and Frank A. Leffingwell, 1201 Fidelity Union Tower, Dallas 1, Texas, Attorneys for Petitioner, this day of April, 1963.

.....
JAMES P. HART.